FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MKB/154777

PRELIMINARY RECITALS

Pursuant to a petition filed December 12, 2013, under Wis. Stat. §49.45(5), and Wis. Admin. Code §HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance (MA), a telephonic hearing was held on February 27, 2014, at Kenosha, Wisconsin.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly determined that the petitioner is not a disabled child for MA-Katie Beckett purposes.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: No Appearance
Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Kenosha County. He lives with his parents and two siblings in the community.

2. On or about August 20, 2013 petitioner applied for Katie Beckett MA. By a letter dated November 1, 2013 the DDB found that petitioner was not disabled. Petitioner sought reconsideration on December 12, 2013, but the DDB affirmed its determination on or about January 10, 2014. Petitioner's file was then forwarded to the Division of Hearings and Appeals for this appeal.

3. DDB determined that the petitioner is not disabled because, although his impairment is "severe," it does not meet, medically equal, or functionally equal the severity of a listed impairment. More specifically, his impairment allegedly does not cause sufficiently marked and severe functional limitations.

4. The petitioner, now age 7, is diagnosed with PDD, ODD and ADHD.

5. The petitioner's condition does not meet the Listing criteria for §112.10 (for Autistic Disorder and Other Pervasive Developmental Disorders) or §112.011 (Attention Deficit Hyperactivity Disorder).

6. In the domain of acquiring and using information, the petitioner has no limitation. The petitioner does grade level work.

7. In the domain of attending and completing tasks, the petitioner has a marked limitation. He is not able to focus, organize and complete work without distracting himself and others without significant problems at school.

8. In the domain of interacting and relating with others, the petitioner has a "less than marked" limitation. He has problems with maintaining friendships, playing cooperatively, and respecting personal space.

9. In the domain of moving about and manipulating objects, the petitioner has no limitations.

10. In the domain of caring for himself, the petitioner has a "less than marked" limitation. He can care for himself in an age-appropriate manner but may need some reminders and supervision, in particular with hair washing. Tantrums are noted in the home and school and bed wetting occurs nightly.

11. In the domain of health and physical well-being, the petitioner has no physical disabilities. No vision concerns have been noted.

DISCUSSION

The purpose of the Katie Beckett waiver is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria, to receive MA while living at home with their parents. Wis. Stat., §49.47(4)(c)1m. The Division of Long Term Care in the Department of Health Services is required to review "Katie Beckett" waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made for the Division by the Disability Determination Bureau (DDB). If the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.

The disability determination is the heart of the matter in this case. "Disability" is defined as an impairment or combination of impairments that substantially reduces a child's ability to function independently, appropriately, and effectively in an age-appropriate manner, for a continuous period of at least 12 months. Katie Beckett Program Policies and Procedures Manual, page 32. Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

> If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:
> (1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter, or
> (2) Would result in a finding that you are disabled under §416.994a.

20 C.F.R. §416.911(b). §416.994a referenced in number (2) describes disability reviews for children found disabled under the prior law.

The process of determining whether an individual meets this definition of disability is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity", he is not disabled and the evaluation stops. Petitioner is not working, so he passed this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that is severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). Petitioner was determined to meet this step.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in Appendix 1 of Subpart P of Part 404 of the regulations. The DDB found that petitioner does not meet the Listings. I reviewed Listing no. 112.10 for Autistic Disorder and Other Pervasive Developmental Disorders. To be eligible under that Listing this child must have 1) the level of severity required for the development of social interaction, verbal/nonverbal communication and imaginative play, and markedly restricted repertoire of activities and interests, or 2) qualitative deficits in the development of reciprocal social interaction and qualitative deficits in verbal and nonverbal communication and in imaginative activity; and at least two of the following:

> a. Marked impairment in age-appropriate cognitive/communicative function, documented by medical findings (including consideration of historical and other information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized psychological tests, or for children under age 6, by appropriate tests of language and communication; or
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> b. Marked impairment in age-appropriate social functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized tests; or
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> c. Marked impairment in age-appropriate personal functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, appropriate standardized tests; or

d. Marked difficulties in maintaining concentration, persistence, or pace.

I have also looked at §112.11 for Attention Deficit Hyperactivity Disorder. To be eligible under this Listing this child must have 1) medically documented findings of marked inattention, marked impulsiveness and marked hyperactivity, and at least two of the following:

a. Marked impairment in age-appropriate cognitive/communicative function, documented by medical findings (including consideration of historical and other information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized psychological tests, or for children under age 6, by appropriate tests of language and communication; or

b. Marked impairment in age-appropriate social functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized tests; or

c. Marked impairment in age-appropriate personal functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, appropriate standardized tests; or

d. Marked difficulties in maintaining concentration, persistence, or pace.

If a child does not meet or equal the Listings, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment. The child must have marked impairments in two of the following six domains , or an extreme limitation in one of the domains: (1) Acquiring and using information, (2) Attending and completing tasks, (3) Interacting and relating with others, (4) Moving about and manipulating objects, (5) Caring for yourself, and (6) Health and physical well-being. See 20 C.F.R. §416.926a(b)(1) and (2). "Marked" limitation and "extreme" limitation are defined in the regulations at 20 C.F.R. §416.926a(e). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). In comparison, "extreme" limitation means a score of three or more standard deviations below the norm.

The DDB found that the petitioner has only one marked impairment and that is in the domain of attending and completing tasks. This is evident with the school environment and his daily and weekly struggles with staying on task, managing his behaviors when he is overwhelmed there, and distracting himself and others. The DDB also found that he has no significant limitations in the domains for acquiring and using information, moving about and manipulating objects, or health and physical well-being. Finally, the DDB found him ‘less than marked’ in the domains for interacting and relating with others, and caring for yourself. I agree with their findings. The petitioner’s intellectual abilities are average and he has no significant physical ailments or gross or fine motor issues. He struggles with reciprocating social interactions and developing friendships but can express himself well and is 90%-100% intelligible (domain for interacting and relating with others). He struggles with frustration/anger/calming himself and his mother reports his lack of stranger danger and running off in public (domain of caring for yourself). However, the evidence still does not show that his degree of limitation is such as to interfere seriously with his functioning.
I have reviewed the extensive case file and I must concur with the DDB’s determination. I do not mean to minimize petitioner’s challenges, but no behaviors have demonstrated two Marked or one Extreme level of limitation. Under these facts, his conditions are not so severe as to functionally render him "disabled" as

that term is defined in the Social Security regulations, or as used for MA and/or Katie Beckett purposes. The DDB correctly determined that the petitioner is not disabled, and denied his MA- Katie Beckett application.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. If his conditions worsen or if he develops better evidence, he may reapply at any time.

CONCLUSIONS OF LAW

That petitioner is not disabled as that term is defined for Katie Beckett MA purposes.

THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 4th day of March, 2014

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on March 4, 2014.

Kenosha County Human Service Department
Bureau of Long-Term Support
Division of Health Care Access and Accountability